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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., PETITIONERS

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on rehearing *en banc* (Pet. App. 1a–25a) are reported at 452 F. 2d 820. The opinion of the original panel of the court of appeals (Pet. App. 26a–37a) and the opinion of the district court (Pet. App. 39a–40a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on November 11, 1971. The petition for a writ

of certiorari was filed on February 9, 1972, and granted on March 27, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether private suits under Section 16(b) of the Fair Labor Standards Act by employees of state hospitals, schools and related institutions to enforce the minimum wage and maximum hours provisions of the Act may be maintained in federal court against these state institutions in light of the Eleventh Amendment to the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201–219, are set forth at Pet. App. 41a–44a.

INTEREST OF THE UNITED STATES

This brief *amicus curiae* is filed pursuant to this Court's order of October 10, 1972, inviting the Solicitor General to submit a brief expressing the views of the United States in this case.

While the Secretary of Labor has important responsibilities in securing compliance with the Fair Labor Standards Act (FLSA), effective enforcement de-

pends largely on private suits under Section 16(b) by the covered employees. If, as the court below held, the Eleventh Amendment bars Section 16(b) suits by employees of state institutions covered by the Act, millions of state employees would be deprived of a significant remedy for violations of the Act and much or all of the burden of enforcement in this area would be shifted to the Secretary. This would have a serious impact on the administration of the Act.

STATEMENT

Petitioners are non-professional employees of five mental hospitals and a cancer hospital operated under the Missouri Department of Public Health and Welfare, and an employee of the Chillicothe Training School for Girls operated under the Missouri Department of Corrections (App. 4).[1] On behalf of themselves and all others similarly situated, they brought suit in the federal district court against the Missouri Department of Health and Welfare, the Missouri Board of Training Schools, and various officials of these departments[2] under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216(b), alleging that they have been required to work in excess of the maximum hours provided in Section 7 of the Act, 29 U.S.C.

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[1] It does not appear from the complaint whether all petitioners are citizens of the State of Missouri, although the court of appeals *en banc* apparently assumed this to be so (Pet. App. 3a, 4a), as did the original panel (Pet. App. 29a). See note 20, *infra*.

[2] Petitioners' complaint states that the individual defendants are sued in their official and in their individual capacities (App. 3).

207, and were therefore entitled to unpaid overtime compensation, liquidated damages and attorney's fees (App. 2–7).[3]

The district court dismissed petitioners' complaint on the ground that this was a suit against the State and that suits by state employees under Section 16(b) of the Act against the State are not "permissible in light of the Eleventh Amendment's recognition of the principle of sovereign immunity" (Pet. App. 39a).[4]

The original panel of the court of appeals reversed, with one judge dissenting (Pet. App. 26a–37a). Upon rehearing, the court of appeals *en banc* affirmed the district court's judgment dismissing the complaint (Pet. App. 1a–12a); four judges dissented (*id.* at 12a–25a). The court *en banc* held that under amendments to the FLSA in 1966, see *Maryland* v. *Wirtz*, 392 U.S. 183, all of the state hospitals in question were covered by the Act and assumed, for the pur-

[3] The court of appeals *en banc* expressly reserved decision on whether petitioners could maintain their suit as a class action (Pet. App. 2a n.2).

[4] With respect to employees in the mental hospitals operated by the State of Missouri, including the five mental hospitals in this case, the Secretary of Labor sued the State under Section 17 of the Act, 29 U.S.C. 217, on January 27, 1971, one year after the employees' complaint here had been dismissed (Pet. App. 39a), seeking to enjoin the State's unlawful withholding of overtime compensation. *Hodgson* v. *State of Missouri*, Civ. No. 19033–2 (W.D. Mo.). On April 18, 1972, the district court entered summary judgment in favor of the Secretary and ordered the State to compute overtime compensation due to its mental hospital employees from January 27, 1969, to July 1, 1971 (Resp. Brief, at A1–A6). (The employees' suit here for unpaid overtime compensation covered the period February 1, 1967, to February 1, 1969 (Pet. App. 39a).)

pose of this case, that the training school for girls was similarly covered (Pet. App. 3a–4a). Nevertheless the court held that petitioners could not maintain this suit in federal court because it is a suit against the State, "the original Constitution and the Eleventh Amendment afford States as sovereigns immunity from suits by private individuals," and Missouri could not be deemed to have consented to suits such as this under the principles of *Pardon* v. *Terminal Railway,* 377 U.S. 184, in light of the factual distinctions between this case and *Parden.* (Pet. App. 4a–12a.) The court added that "If any balancing of rights under the Commerce Clause against the right of the State's sovereign immunity is required, the well-recognized constitutional guarantee of sovereign immunity should prevail" (Pet. App. 9a).

The four dissenting judges, while agreeing that this is a suit against the State and that the State had not expressly consented to be sued, rejected "the thesis of the majority that any waiver of sovereign immunity to suit in this case must rest upon actual as opposed to constructive consent to be sued by the State of Missouri" (Pet. App. 12a). In the dissenters' view, this case is controlled by *Parden* and the "state's consent results from the interrelation of the activities of the state and regulations placed thereon by Congress" (Pet. App. 19a); the State "by conducting the specific activities falling within the Act, constructively consents to suit by its covered employees and waives its Eleventh Amendment immunity" (Pet. App. 24a–25a).

ARGUMENT

INTRODUCTION AND SUMMARY

As originally enacted, the Fair Labor Standards Act of 1938 required every "employer" to pay those of his employees who were "engaged in commerce or in the production of goods for commerce" a certain minimum hourly wage and a higher rate for work in excess of a certain maximum number of hours per workweek.[5] The Act defined "employer" to exclude "the United States or any State or political subdivision of a State * * *."[6]

In 1961 Congress amended the Act to cover not only employees who were themselves engaged in commerce, but also employees of any "enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. 206, 207.[7] In 1966 Congress made two further changes that are significant to the issue in this case.

First, it extended coverage of the Act to include an enterprise that has the requisite nexus with commerce and:[8]

> is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped

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[5] Sections 6(a), 7(a), 52 Stat. 1062, 1063.

[6] Section 3(d), 52 Stat. 1060.

[7] The phrase "enterprise engaged in commerce or in the production of goods for commerce" is defined in 29 U.S.C. 203(s). "Enterprise" is defined in 29 U.S.C. 203(r).

[8] Act of Sept. 23, 1966, 80 Stat. 832, 29 U.S.C. 203(s)(4).

> or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit).

Also, while retaining the general exemption of States and political subdivisions from the definition of "employer," Congress provided an exception [9] with respect to employees of the hospitals, schools and institutions described above in Section 3(s)(4) [10] and in Section 3(r)(1).[11]

Shortly after these provisions became effective, the State of Maryland, later joined by 27 other States, sued to enjoin enforcement of the Act insofar as it related to schools and hospitals operated by the States or their subdivisions, claiming that in this respect the Act unconstitutionally interfered with sovereign state functions. In *Maryland* v. *Wirtz*, 392 U.S. 183, this Court held that "labor conditions in schools and hospitals can affect commerce" (*id.* at 194) and that "a 'rational basis' exists for congressional action prescrib-

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[9] Act of Sept. 23, 1966, 80 Stat. 831, 29 U.S.C. 203(d).

[10] Not all such employees are covered, however, since the Act exempts any "employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) * * *." 29 U.S.C. 213(a)(1).

[11] 29 U.S.C. 203(r)(1). This Section defines "enterprise" as activities performed for a business purpose and deems the activities of the institutions described in the quotation in the text from Section 3(s)(4), *supra*, as "activities performed for a business purpose."

ing minimum labor standards for schools and hospitals, as for other importing enterprises" (*id.* at 195). In regard to the States' contention that Congress' power under the Commerce Clause must yield to state sovereignty in the performance of governmental functions, the Court held that if a State engages in activities that are validly subject to federal regulation when performed by private parties, the State likewise may be constrained to act according to federal law (*id.* at 196–197).

The constitutional validity of the substantive provisions upheld in *Maryland v. Wirtz* is not in issue here. Rather the questions presented in this case relate to the remedy for a State's failure to comply with the Act's wage and hour requirements for employees of state hospitals and schools, and to the specific issue left unresolved in *Maryland* v. *Wirtz*, 392 U.S. at 200—whether the Eleventh Amendment bars such state employees from recovering unpaid overtime compensation by suing their state employer in federal court under Section 16(b) of the Act (29 U.S.C. 216(b)).

Respondents here claim first that Congress did not intend to authorize state employees to sue in federal court under Section 16(b). But, as we explain below, Section 16(b) applies to all "employees" and all "employers" and the Act specifically defines those terms to include employees of state employers engaged in the operation of schools and hospitals.

Respondents also argue that the Eleventh Amendment bars Section 16(b) suits by state employees in federal court unless the State consents to be sued. As

we contend in detail below, however, this Court's decision in *Parden* v. *Terminal Railway*, 377 U.S. 184, upholding the right of state employees to sue their state employer in federal court under the Federal Employees Liability Act, is controlling here. The Section 16(b) action in this case is not within the literal terms of the Eleventh Amendment since this is a suit not by citizens of one State against another State but by citizens against their own State. Although in *Hans* v. *Louisiana*, 134 U.S. 1, this Court extended sovereign immunity to include suits in the latter category, here, in contrast to *Hans*, the claim of immunity meets a cause of action created by Congress under the Commerce Clause. In this situation *Parden* holds that where, as here, the State has engaged in activities that are validly subject to congressional regulation, it is subject to those regulations as fully as if it were a private person or corporation. As in *Parden*, the state employees' right of action under Section 16(b) is crucial to enforcement of the Act; if state employees covered by the Fair Labor Standards Act are not entitled to sue, many of them will, for all practical purposes, be without a remedy.

I

UNDER THE FAIR LABOR STANDARDS ACT, STATE EMPLOYEES COVERED BY THE ACT ARE ENTITLED TO SUE THEIR STATE EMPLOYER PURSUANT TO SECTION 16(b) FOR UNPAID MINIMUM WAGES OR OVERTIME COMPENSATION

Before reaching the Eleventh Amendment issue, we discuss the contention of the respondent state agencies

and officers (Resp. Brief, at pp. 7–10) that Congress did not give state employees a right of action under Section 16(b) of the Act to recover unpaid minimum wages or overtime compensation. In the court below, the majority appeared to assume that Congress intended to allow state employees to sue under Section 16(b),[12] and the dissenting judges, after reviewing the 1966 amendments to the Act, concluded that "Congress intended to afford state employees the same direct right of suit against their employers as is possessed by covered employees of nongovernmental employers" (Pet. App. 20a; *id.* at 19a–22a). We agree.

Section 16(b) provides that "[*a*]*ny employer*" who violates the minimum wage or maximum hours provision of the Act[13] "shall be liable to the employee or employees affected" for the amount unlawfully withheld; and "*any one or more employees*" may maintain an action to recover such liability in "any court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis

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[12] Otherwise the court presumably would not have reached the constitutional issue. However, at one point in its opinion the court states: "Section 216(b) permits double damages and allowance of attorney fees. It cannot reasonably be inferred from the statute and its legislative history that Congress intended to impose such penalties on sovereign States" (Pet. App. 10a-11a). But see note 41, *infra*.

[13] 29 U.S.C. 206, 207.

[14] In addition, the employee is entitled to an "equal amount as liquidated damages," unless the employer shows "to the satisfaction of the court" that his violation was in "good faith" and that he had "reasonable grounds" for believing he had not violated the Act, in which case the "court may, in its sound discretion" award a lesser amount of liquidated damages or none at all. 29 U.S.C. 216(b), 260. Moreover, if the employee

dded.[14] The statutory language thus specifies that Section 16(b) applies to all "employees" and "employers" within the meaning of the Act. "Employee" is defined n Section 3(e) to include "any individual employed by an employer"[15] and under the 1966 amendment to Section 3(d)[16] the State is an "employer" with respect to its employees "in a hospital, institution or school" covered by the Act.[17] On its face, therefore, Section 16(b) applies to those state employees protected by the Act, and there is nothing to indicate that Congress intended to deprive this class of employees of the Section 16(b) remedy. To the contrary, every indication is that Congress intended to put state school and hospital employees on an equal footing with private employees by giving them the same rights and remedies in regard to minimum wages and overtime compensation.

Indeed, respondents do not contend otherwise, but urge only that because States are constitutionally immune from suits such as those under Section 16(b), "a state should not need an exemption in an act of Congress to preserve that immunity" (Resp. Brief, at p. 8). But that is not an argument on statutory construction. It is instead an argument that depends on

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prevails, the "court in such action shall * * * allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. 216(b). And the employee may commence his action "within two years after the cause of action accrued" or within three years if the employer's violation is willful. 29 U.S.C. 255.

[15] 29 U.S.C. 203(e).

[16] 29 U.S.C. 203(d).

[17] See note 10, *supra*.

whether States are in fact constitutionally immune from Section 16(b) suits in federal courts—the central issue in this case.[18] If under the Constitution the States are subject to such suits, as we argue below, then the Constitution does not support the exception respondents urge this Court to read into Section 16 (b).

II

THE ELEVENTH AMENDMENT DOES NOT BAR SUITS IN FEDERAL COURT BY STATE EMPLOYEES AGAINST THEIR STATE EMPLOYER UNDER SECTION 16(b) OF THE ACT

A. THE CONSIDERATIONS THAT WERE DETERMINATIVE OF THE ELEVENTH AMENDMENT ISSUE IN *Parden* v. *Terminal Railway*, 377 U.S. 184, ARE EQUALLY APPLICABLE HERE

The language of the Eleventh Amendment[19] to the Constitution refers only to suits in federal court by a citizen of one State (or of a foreign nation) against another State; the Amendment is phrased in jurisdictional terms and provides that the judicial power of the United States shall not extend to any suit "against one of the United States by Citizens of

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[18] Respondents repeat this argument on pp. 9–10 of their brief, where they contend that Section 16(b) did not authorize the employees' suit in federal court in this case because that Section confers jurisdiction only upon courts of "competent jurisdiction," which, according to respondents, does not include federal courts because the State is immune from such suits. Again this assumes the issue here: whether States are constitutionally immune from Section 16(b) suits in federal courts.

[19] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

another State * * *." Although by its terms the Eleventh Amendment would therefore not bar the employees' federal-court suit here against their own State,[20] in *Hans* v. *Louisiana*, 134 U.S. 1, the Court held that in light of the Eleventh Amendment, a State should be immune from actions in federal court brought by its own citizens as well as by citizens of another State.[21] The court below was of the view that *Hans* therefore deprived the federal court of jurisdiction in this case since Missouri had not consented to this action (Pet. App. 4a–5a).

In our view, however, the employees' Section 16(b) action here was not barred. This is not a suit within the core of the Eleventh Amendment; at most, it is a suit on the periphery, affected by that constitutional provision only because of the extension in *Hans* that encompasses some cases outside its literal terms. As against this, Section 16(b), upon which the employees here based their suit, is a federal remedy enacted by Congress to enforce the Act's substantive wage and hour provisions—provisions that this Court upheld as constitutional when applied to state schools and hospitals in *Maryland* v. *Wirtz*, *supra*.[22] And, of course,

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[20] See note 1, *supra*. Since petitioners seek review of the decision of the court of appeals *en banc* affirming the district court's dismissal of their complaint, we assume, as did the court of appeals (Pet. App. 3a, 4a, 29a), that petitioners are citizens of the State of Missouri. See *Conley* v. *Gibson*, 355 U.S. 41, 45–46.

[21] Even the *Hans* extension would not cover suits by state employees in state courts, which are also authorized by Section 16(b). See *Iowa Beef Packers* v. *Thompson*, 405 U.S. 228; pp. 23-24, *infra*.

[22] See note 26, *infra*.

under the Constitution's Supremacy Clause, federal remedial law is no less entitled than federal substantive law to prevail over conflicting state policies. Moreover, although the employees' Section 16(b) suit seeks personal recovery for unpaid wages, this is not simply a private action. Section 16(b) has a "public-private character" for "[a]lthough this right to sue is compensatory, it is nevertheless an enforcement provision." *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 709. Suits under Section 16(b) not only ensure that an employer will not gain an unfair advantage over his competitors by paying lower than the minimum hourly wage, but also help accomplish Congress' objective of spreading employment by placing financial pressure on employers through the overtime pay requirement. See *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 40.

On the other hand, the concern of the Eleventh Amendment is that a State's sovereignty would be affronted by private suits brought against it in federal courts by individuals.[23] This Court has never held, for example, that a public suit against a State by the federal government is barred by the Eleventh Amendment. See *United States* v. *Texas,* 143 U.S. 621. And with respect to Section 16(b), Congress intended employees to stand in the stead of the federal government, "thus avoiding the assumption by Government of the sole responsibility to enforce the act."[24]

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[23] See *Parden* v. *Terminal Railway,* 377 U.S. 184, 187.

[24] 83 Cong. Rec. 9264 (remarks of Rep. Keller), quoted in *Brooklyn Savings Bank* v. *O'Neil, supra,* 324 U.S. at 705–706 n. 16.

In view of all these circumstances, we submit, Congress' valid exercise of authority under the Commerce Clause prevails over the State's objection, on the basis of the *Hans* extension of sovereign immunity, that it is entitled to withhold its consent to suit and thereby preclude state employees from enforcing their rights under the Fair Labor Standards Act. This, we believe, is the meaning of *Parden* v. *Terminal Railway,* 377 U.S. 184. In that case employees, who were citizens of Alabama, sued their employer, a railway owned and operated by Alabama, in federal district court seeking damages under the Federal Employers' Liability Act (FELA).[25] This Court rejected the State's claim of sovereign immunity based on the Eleventh Amendment and *Hans* v. *Louisiana, supra,* and held that by operating a common carrier in interstate commerce the State had subjected itself to suits in federal court by its employees under the FELA.

In *Parden,* the Court first noted that the case before it was "distinctly unlike *Hans* v. *Louisiana, supra,*" which was a suit in federal court on state debt obligations—"precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed." 377 U.S. at 186–187. In *Parden*—as in the present case—the "State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress." 377 U.S. at 187. *Hans* therefore did not necessarily control and, after concluding that the FELA authorized the employees'

[25] 45 U.S.C. 51–60.

action, the Court proceeded to consider whether Congress had the power thus to subject the State to suit. 377 U.S. at 187–190.

In response to the State's argument that its immunity from suit by a citizen was inherent in the nature of sovereignty, the Court answered that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." 377 U.S. at 191. And since Congress had acted within its regulatory power in imposing the FELA right of action on state railroads, "it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." 377 U.S. at 192.[26]

Parden further held that whether a State is subject to suit by its citizens pursuant to a federal cause of action depends upon federal law; Alabama's constitutional provision precluding the State from ever being made a defendant in a court of law therefore did not control. 377 U.S. at 194–196.

Although a State's immunity from suit by an individual is recognized by the Eleventh Amendment and by judicial decisions, "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196. Any other

[26] In this situation, the oft-cited rationale for sovereign immunity that "there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (Mr. Justice Holmes), is inapplicable: the right of action against the State is based not on state law, but on a federal statute.

result "would bear the seeds of a substantial impediment to the efficient working of our federalism" since States are engaging in activities "which if carried on by a private person or corporation, would be subject to federal regulation." 377 U.S. at 197.

In our view, *Parden* is dispositive here and requires, as the court of appeals for the Tenth Circuit held in *Briggs* v. *Sagers*, 424 F. 2d 130, that Section 16(b) of the FLSA be declared valid insofar as it permits state employees to sue their state employer in federal court for minimum wages or overtime compensation unlawfully withheld. As in *Parden*, the employees here invoke a federal cause of action and the case is therefore unlike *Hans* v. *Louisiana*, *supra*, upon which the court below relied. As in *Parden*, by operating schools and hospitals the State has engaged in activities properly subject to federal regulation. See *Maryland* v. *Wirtz*, *supra*. And as in *Parden*, the State is subject to those federal regulations as fully as if it were a private person or corporation.

Indeed, one of the purposes of applying the FLSA minimum wage and maximum hour standards to those state enterprises was to bring about competitive equality "with similar activities carried on by enterprises organized for a business purpose"; thus, Congress recognized that "[f]ailure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966).[21] Whether the State's activi-

[21] See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 710.

ties here should be characterized as "proprietary" or, as respondents claim (Brief, at pp. 10–11), "governmental" is not important.[28] See *Briggs* v. *Sagers, supra,* 424 F. 2d at 133. As this Court held in *Maryland* v. *Wirtz, supra,* 392 U.S. at 195, "it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." [29] And long ago in *Sanitary District* v. *United States,* 266 U.S. 405, 426, the Court, speaking through Mr. Justice Holmes, declared the governmental-proprietary dichotomy "irrelevant." [30] Nor is *Parden* based upon any distinction between "governmental" and "proprietary" activities.[31]

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[28] The court below stated that the State's operation of schools and hospitals is "governmental" while state operation of a railway, as in *Parden*, is "proprietary" (Pet. App. 11a). But see note 29, *infra.*

[29] In the 1966 amendments to the Fair Labor Standards Act, Congress provided that activities performed in connection with the operation of a state hospital or school "shall be deemed to be activities performed for a business purpose." 29 U.S.C. 203(r).

[30] See also *United States* v. *California,* 297 U.S. 175, 183–184, where this Court deemed it "unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity" since the pertinent question was "whether the exercise of that [state] power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government."

[31] See also 3 Davis, *Administrative Law Treatise* 459–466 (1958), discussing the "governmental-proprietary" distinction and concluding that the "distinction is probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction." *Id.* at 460.

In sum, where, as in this case, Congress has prescribed regulations in regard to state activities validly subject to regulation under the Commerce Clause, and has created a private cause of action to enforce these provisions, the State cannot bar such a suit by its citizens in federal court on the basis of sovereign immunity. Congress' power thus to regulate interstate commerce cannot be vetoed by a State's refusal to consent to suit; by becoming a member of the Union and by engaging in activities within the Commerce Clause, the State has put itself on the same footing as private persons subject to the Act and has, by implication, consented to suits under Section 16(b).

B. THIS CASE IS NOT DISTINGUISHABLE FROM PARDEN ON THE BASIS THAT THE STATE HAD BEEN OPERATING SCHOOLS AND HOSPITALS BEFORE THE ACT'S WAGE AND HOUR PROVISIONS BECAME APPLICABLE TO STATE EMPLOYEES OF THESE INSTITUTIONS

The court below held (Pet. App. 12a), and respondents here argue (Brief, at pp. 10–11), that *Parden* is distinguishable on its facts from the present case because Missouri had been operating the schools and hospitals involved here before the 1966 amendments to the FLSA, whereas in *Parden,* 377 U.S. at 192, Alabama began operating an interstate railway twenty years after passage of the FELA. The argument is that while Alabama could be deemed to have "waived" its sovereign immunity by engaging in regulated activities in those circumstances, here Missouri could not. It is not clear whether, in light of this claimed distinction, respondents would agree that employees of state hospitals or schools established after 1966 would

be entitled to sue under Section 16(b), although state employees of older institutions would not have such a right of action. In any event, the decision in *Parden* did not turn on chronological factors and cannot properly be distinguished on that basis.

Under *Parden*, state-operated railways in interstate commerce are fully subject to the FELA regardless of when they began operation. For example, California's state-owned railway described in *United States* v. *California*, 297 U.S. 175, and *California* v. *Taylor*, 353 U.S. 553—decisions this Court relied upon in *Parden*, 377 U.S. at 188–189, 191–193—was established approximately seventeen years *before* passage of the FELA.[32] Yet there is no doubt that the FELA fully applies to the California railway and allows employees to sue the State for damages. Indeed, the California decision so holding, *Maurice* v. *State*, 43 Cal. App. 2d 270, 110 P. 2d 706 (Cal. Dist. C.A.), was specifically cited and quoted with approval at length by this Court in *Parden*, 377 U.S. at 189, 193. Thus, whether a State is entitled to immunity does not depend upon when it undertook the activities in question.[33] Rather, what matters is the nature of the State's activities, for as *Parden* holds, "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196.

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[32] Transcript of Record, at p. 26, in *United States* v. *California*, No. 33, Oct. Term, 1935.

[33] See also *Briggs* v. *Sagers*, *supra*, 424 F. 2d at 134, rejecting this purported distinction.

C. NOR CAN PARDEN BE DISTINGUISHED ON THE GROUND THAT OTHER METHODS, IN ADDITION TO SECTION 16(b) SUITS, ARE AVAILABLE FOR ENFORCING THE ACT

Respondents also argue (Brief, at pp. 12–13) that unlike *Parden,* where the state employees' only remedy under the FELA was a private damage action against the state railway, here there are other methods for enforcement of the Fair Labor Standards Act in addition to private suits in federal courts under Section 16(b) and the employees' suit should therefore be barred because of the State's claim of immunity. The discussion of this point in *Parden,* however, is related to the issue of statutory interpretation, that is, whether the FELA authorized state employees to sue their employer for damages. See 377 U.S. at 190.[34] We have stated in point I, *supra,* why we believe that, as a matter of statutory construction, the Section 16(b) remedy applies here.

Moreover, Section 16(b) is as crucial to full enforcement of the FLSA as is the private right of action under the FELA discussed in *Parden.* The Fair Labor Standards Act authorizes three types of civil remedies to secure compliance:[35] (1) suits by covered employees to recover unpaid minimum wages or overtime compensation, 29 U.S.C 216(b); (2) suits by the Secretary of Labor, upon the employee's request, to recover the amount of such unpaid sums

[34] The Court there said "To read a 'sovereign immunity exception' into the Act would result, moreover, in a right without a remedy * * *."

[35] The Act also contains criminal penalties for certain violations, 29 U.S.C. 216(a).

where no unsettled issue of law is involved, 29 U.S.C. 216(c); and (3) injunctive actions by the Secretary of Labor to restrain violations of the Act, including restraint of the withholding of sums due employees, 29 U.S.C. 217; see 29 U.S.C. 211(a).

Of course, the defense of state sovereign immunity does not apply to suits against a state employer by the Secretary under Section 17 [36] and respondents do not argue otherwise. The Secretary's authority to bring such suits, however, does not diminish the importance of Section 16(b) actions by state employees. As this Court has observed, "the provisions of the [Fair Labor Standards Act] affect weekly wage dealings between vast numbers of business establishments and employees." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292. In 1971, for example, the Act covered 45.4 million employees and nearly 2 million establishments;[37] 2.7 million of these employees and 118,000 of these establishments were in the sector of state and local government employment, including

[36] The Secretary brings Section 17 actions "not in his individual, but in his official capacity. The suit [is] for the benefit of the United States * * *. It is perfectly clear, therefore, that it [is] in effect a suit by the United States." *Walling* v. *Norfolk Southern Ry. Co.*, 162 F. 2d 95, 96 (C.A. 4). See also *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137, 138 (C.A. 2); *Wirtz* v. *Jones*, 340 F. 2d 901, 904 (C.A. 5). Section 17 suits by the Secretary are thus, in effect, suits by the United States, and there is no Eleventh Amendment or sovereign immunity bar to such suits. *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 297 U.S. 175. Cf. *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138.

[37] Department of Labor, *1972 Report to Congress on Minimum Wage & Maximum Hours Standards under the Fair Labor Standards Act* 35.

state schools and hospitals.[38] Yet less than 4 percent of these establishments can be investigated by the Secretary each year.[39]

In view of the magnitude of the number of employees and establishments covered under the Act, the Secretary obviously must concentrate the limited resources available for enforcement on cases that involve the greatest public interest, the highest chance of success, and the most impact in other areas. The unavoidable result is that state employees of schools and hospitals may find themselves in precisely the same situation as the employees in *Parden:* if they are unable to sue their state employer under Section 16(b) they may be, for all practical purposes, left in the position of having a right without a remedy, especially if the particular violation alleged by the employee is not pursuant to any general state policy affecting large numbers of state workers, which might make a suit by the Secretary more likely.[40]

So far we have discussed Section 16(b) on the premise that if state employees cannot bring a suit thereunder in federal court against their state employer they may be without any right of action, as respondents and the court below apparently assumed. It is significant, however, that Section 16(b) authorizes employee suits to be brought in "any court of

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[38] *Id.* at 36.

[39] *Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1973 before a Subcommittee of the House Appropriations Committee* (Part VI), 92d Cong., 2d Sess. 409 (April 13, 1972). See also *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261, 1263 n. 2 (C.A. 5).

[40] See note 4, *supra*.

competent jurisdiction," which includes state as well as federal courts. See *Iowa Beef Packers* v. *Thompson*, 405 U.S. 228.

Regardless of the outcome of the present case, if the employees here had sued their state employers in state court, as they were entitled to do under Section 16(b), it is at best doubtful that the State could have successfully invoked immunity under the Eleventh Amendment since, by its terms, that constitutional provision deals only with the jurisdiction of federal courts ("The Judicial power of the United States shall not be construed to extend to * * *"). And under *Testa* v. *Katt*, 330 U.S. 386, state courts have an obligation to enforce federal law, even when it is contrary to state policy. See also *General Oil Co.* v. *Crain*, 209 U.S. 211 (reversing the state court's dismissal on the basis of sovereign immunity of an action to enjoin a state official from enforcing a tax that allegedly burdened interstate commerce). But if Section 16(b) suits may be brought against state employers in state courts, what substantial interest can a State have in partially vetoing Congress' will by seeking to preclude the same congressionally-authorized remedy in federal courts? We perceive none and believe this consideration further supports the right of the state employees here to maintain their Section 16(b) action in federal court.

In any event, the State's only possible interest in barring Section 16(b) suits in federal court is to avoid liability.[41] But that, we submit, is not a legitimate rea-

[41] Indeed, respondents suggest that the reason Missouri desires to avoid being sued under Section 16(b) by its employees is

son for recognizing sovereign immunity here since there is no doubt that state hospitals and schools are obligated to comply with the Act's wage and hour provisions. *Maryland* v. *Wirtz, supra.* If a State violates the Act, it is liable to the same extent as a private person or corporation and, as a practical matter, the availability of suits under Section 16(b) is the only way to achieve uniform application of the Act in this area and the only way to ensure that state employees will be compensated by their state employer for wages and overtime compensation unlawfully withheld.

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that it does not wish to pay liquidated damages, which a court might assess, in addition to compensation it has unlawfully withheld (Resp. Brief, at p. 13).

But as this Court held in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, "the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank* v. *O'Neil*, *supra*, 324 U.S. at 707. There is no valid basis for exempting States from such liability. If a State wishes to avoid paying liquidated damages it should comply with the Act, as it is obligated to do. See *Maryland* v. *Wirtz*, *supra*. And even if it were assumed that a State should not be required to pay liquidated damages, it would not follow that it should be totally immune from suit under Section 16(b).

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit in this case should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

RICHARD F. SCHUBERT,
Solicitor,

CARIN ANN CLAUSS,
Attorney,
Department of Labor.

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